No. [redacted]168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION,
APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

APPELLEE'S BRIEF ON APPELLANTS' MOTION TO REMAND.

ALBERT S. MARLEY,
Attorney for Appellee, B. Haywood Hagerman.

No. 737.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION,
APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

STATEMENT.

There is already on file in this court a "motion to dismiss appeal," filed by this appellee, B. Haywood Hagerman. The appellants McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City, have filed their brief in opposition to said motion to dismiss appeal; and in addition thereto, have also filed a motion to remand the cause back to the United States Circuit Court of Appeals of the Eighth Circuit. We take it that both motions will be by this

court considered together, and for that reason will not set out in opposition to "appellants' motion to remand" to the United States Circuit Court of Appeals, of the Eighth Circuit, the points raised and authorities cited by appellee in his motion to dismiss appeal. It is apparent from the bill of complaint that either this court had sole and exclusive jurisdiction of the appeal allowable from the decree entered by the trial court on July 7th, 1921, or else the case is entirely without Federal jurisdiction, and the hearing of the case by the trial court, the transferring of the case to this court by the United States Circuit Court of Appeals of the Eighth Circuit, were all idle ceremony. It clearly appears from the record that the question of diverse citizenship or any other ground giving the Circuit Court of Appeals jurisdiction is not in the case; and that, unless the protection of the Fourteenth Amendment of the Constitution of the United States was properly invoked by the appellee's bill of complaint, there is no jurisdiction in any Federal court.

We will again set out portions of the bill of complaint set out in appellee's motion to dismiss filed in this cause as well as an additional paragraph therefrom.

Paragraph 3 of the bill of complaint reads as follows, to-wit:

> "That the controversy herein arises under and involves, the construction of the Constitution of the United States and particularly the Fourteenth Amendment of said Constitution as hereinafter specifically shown."

Paragraph 12 of said bill of complaint reads as follows, to-wit:

"By the aforesaid special assessments it is attempted to put more than two-thirds of the costs of the aforesaid improvement which is most general in its nature and designed for all the people of Kansas City, upon the neighboring property holders (including the complainant) owning land north of the aforesaid improvement; and less than one-third of the cost of said improvement upon the neighboring property holders owning land lying south of said improvement. That the aforesaid benefit district lying north of the aforesaid improvement on the east end thereof extends north 1388 feet distant from the said improvement and on the west end of the said improvement extends 2196 feet distant north of said improvement, and on the west end thereof, extends only a distance of 225 feet south thereof, and on the east end thereof extends only a distance of 650 feet south of the said improvement; leaving owners of property at the east end of and on the south side of the said improvement at from a distance of from 725 feet to a distance of 1388 feet south from the said improvement, and the property owners at the west end of and south side of said improvement from a distance of from 225 feet to a distance of 2171 feet south of said improvement, all totally free, clear and exempt from bearing any part of the expense of said improvement, when the said lands so kept free and clear and exempt from said improvement received greater direct special benefits on account of said improvement, than the hereinbefore mentioned tract "A" owned by the complainant, against which the aforesaid assessments have been attempted to be made; that the improvements are as shown of the most general character and designed for all of the people of the said Kansas City. At present the said forty (40) acres of the complain-

ants are not accessible to said improvement and will not be accessible to improvement for years to come. It is manifestly an improvement of a general nature and taxes of a special nature are sought to be imposed for the payment thereof, as hereinafter shown, all of which is undertaken to be done under the provisions of the municipal charter of Kansas City hereinabove set out."

Paragraph 13 of the bill of complaint reads as follows, to-wit:

"That said ordinance No. 21831, and said assessment attempted to be made against said property of said complainant, and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional, null and void, for the reason that they and each of them if enforced, will deprive complainant of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; in that the said property although located a great distance from said boulevard, is, pursuant to said ordinance and said assessments, sought to be charged with the same benefits, and in the same proportion as property immediately abutting upon said boulevard, and which is necessarily specially benefited greatly in excess of all property which does not adjoin and abut upon said boulevard and especially property located as that of complainant at a great distance from said boulevard, thereby depriving complainant of the equal protection of the law in violation of Section 1 of Fourteenth Amendment to the Constitution of the United States; in that said Section 28 of Article VIII, and said ordinance and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this complainant, or his predecessor in title, any opportunity to be heard as to the apportionment of the benefits resulting from

the cost of said grading among the various tracts of property in the benefit district, and complainant's predecessor in title and complainant had no notice or opportunity to be heard in relation to the value at which their property was assessed by the city assessor, nor as to the amount of benefits, if any, accruing to it, by reason of said improvements, but that said section of said charter and said ordinance provide for an arbitrary and unfair and discriminating method of apportionment as hereinbefore shown, all of which is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States as hereinabove set forth; and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with the cost of said work or against this complainant, as required by said charter and by said ordinance as aforesaid."

Paragraph 14 of the bill of complaint reads as follows, to-wit:

"Complainant further states that the pretended benefit district described in and fixed by said ordinance of Kansas City, No. 21831, was unreasonable, discriminating, arbitrary, and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work, upon the land of complainant; a large amount of land, including the said tract of complainant, lying a long distance north of and not abutting or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard was left wholly out of said benefit district and was not assessed at all for such grading. Complainant fur-

ther states that the benefit district described in said Ordinance No. 21831, was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and benefit, while, as a matter of fact, the improvement was not of a local nature, but was designated to be and is of a general nature and for the general public benefit, as aforesaid. Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty (220) to five hundred (500) feet in width, and it is not appropriate, necessary or useful to, nor a peculiar local benefit to, the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted suburban lands, as aforesaid. And, although said Meyer Parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the charter of Kansas City."

Paragraph 15 of the bill of complaint reads as follows, to-wit:

"Complainant further alleges it is an obvious, palpable fact that the owners and occupants of the land lying north of said boulevard, and toward the center of the city, will have practically no use of nor benefit from said boulevard, while the owners and occupants of the land south of said boulevard will have some use of said boulevard as an approach to and from the center of the city. And, notwithstanding the obvious fact that the land north of said boulevard has less use of and less bene-

fit from said Meyer Boulevard than the land on the south, the land north of said boulevard was assessed over seventy-one thousand dollars ($71,000.00), or about 73 per cent of the cost of the grading said boulevard, while the land south of said boulevard was assessed only about twenty-six thousand ($26,000.00) dollars or only 27 per cent of the cost of grading said boulevard."

Paragraph 16 of the bill of complaint reads as follows, to-wit:

"Complainant further states that all the land in said benefit district fixed by said ordinance No. 21831, is unplatted and unimproved suburban land, there being no house or other improvement fronting on said boulevard and no house or other edifice, except one, in the entire benefit district. The lands in said benefit district are purely acre properties, and are of small value, and the lands that do not abut on said Meyer Boulevard (and such is the land of complainant), were assessed by the city assessor, as aforesaid, for the purpose of this proceeding, equally as high or higher per acre than the lands abutting upon the boulevard and the apportionment of the assessment of the said cost of grading Meyer Boulevard was land ratably over the lands in said benefit district according to the said assessed value, the result being that lands far removed, much of it more than one-fourth of a mile distant from and north of said Meyer Boulevard, were taxed for said grading, per acre equally with or greater than the land abutting on said boulevard., None of the lands in the benefit district were laid off into lots and blocks, and so it is true that the land abutting and adjacent to the said boulevard and extending back therefrom to a depth of one hundred fifty (150) feet, which according to Section 3 of Article VIII of the Charter of Kansas

City, should be deemed as the land abutting upon a boulevard and be chargeable with grading costs, was assessed with but approximately twelve thousand ($12,000.00) dollars or only about 12 per cent of the cost of said grading, while the lands in the benefit district that do not abut on said boulevard or lie within one hundred fifty feet thereof and are but little, if at all, specially benefited by said grading, were assessed with about eighty-five thousand ($85,000.00) dollars or about 88 per cent of the cost of said grading, and thus the land of complainant lying far removed from said boulevard is taxed more than the aggregate of all lands abutting thereon, although no greater in area."

Paragraph 18 of the bill of complaint reads as follows, to-wit:

"Complainant states that his said land was assessed in a purely arbitrary, unjust and discriminatory manner, and not in accordance with or in consideration of the benefits to said lands by reason of said improvements and that the assessments made and tax bills issued against his said land are far in excess of the special benefits, if any, accruing to his land, by reason of such grading, and are so great as to amount to a confiscation of complainant's land."

Paragraph 19 of the bill of complaint reads as follows, to-wit:

"That by Section 28 of Article VIII of Charter of Kansas City, Jackson County, Missouri and said Ordinance 21831, said assessments attempted to be made against said property of complainant and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional, null and void, for the reason that, they

and each of them, if enforced will deprive complainant of his property in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; in that the said property of complainant although located a great distance from said boulevard, is, pursuant to said section of said charter and said ordinance and said assessments sought to be charged with benefits, while property lying south of that said improvement and nearer than complainant's said property to the said improvement as hereinbefore shown, and therefore necessarily benefited greatly in excess of the aforesaid property owned by the plaintiff, is not charged with any part of the cost of the said improvement and thereby the complainant is deprived of the equal protection of the law of Missouri in violation of Section 1 of Fourteenth Amendment of the Constitution of the United States; the said Section 28 of Article VIII and said ordinance and said proceedings hereinbefore referred to did not provide for giving or granting to this complainant or his grantor, any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading, as to the fact that complainant was being deprived of the equal protection of the laws of Missouri, as to the fact that complainant was being discriminated against, as hereinbefore shown in the making and levying of the special benefits to be collected for the payment of the cost of the aforesaid improvement; but the said section of the said charter and said ordinance provided for an arbitrary, unfair and discriminating method of apportionment, all of which was, and is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the complainant and his grantor had no notice of or opportunity to be heard in relation to, the discrimination against complainant's property as herein before shown, all in violation of said Section 1 of said Fourteenth Amendment."

SUGGESTIONS.

We believe that the foregoing paragraphs, from appellee's bill of complaint, clearly show that at the outset it was the specific intention of the appellee to invoke and rely exclusively as to jurisdiction upon the Fourteenth Amendment of the Constitution of the United States. Such being the fact, it clearly appears from the authorities cited by the appellee in his motion to dismiss appeal that it was his invocation of the Constitution of the United States, that gave the trial court its jurisdiction to grant the decree entered of record on July 7th, 1921. It has not been contended by the appellants and neither has it been shown by them, that the jurisdiction of the Federal Court was invoked on any other ground, and applying the test laid down by this court, in *St. Anthony's Church* v. *Pennsylvania R. R. Co.*, 237 U. S. page 577, as follows, to-wit:

> "In other words, the inquiry as to whether if the averments in the complaint of diversity of citizenship are disregarded, there would yet remain in the complaint such averments as to the existence of rights under the constitution and laws of the United States as would be adequate to sustain jurisdiction."

it would clearly appear, that eliminating from appellee's bill of complaint and disregarding, his invocation of the federal constitution as a shield, there would be nothing upon which to base any federal jurisdiction.

The construction and application of the Fourteenth Amendment of the Constitution of the United States giving the trial court original and this court appellate jurisdiction, then this court on an appeal, when properly taken, within the time fixed by the statutes of the United States would have the right to review every question, state as well as federal, disclosed by the record. In the case of *Southern R. R. Co.* v. *Watts*, 43 U. S. S. C. R. 194, this court has said:

> "Many of the objections made, raise questions as to the meaning and effect of recent statutes of the state which have not been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raised questions of facts on which the evidence is submitted by affidavit, and is in certain respects conflicting. But in all the cases, jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the federal constitution or out of the constitution or statutes of the state, may be presented in a single suit. We must therefore determine the state as well as the federal questions; *Mich. Central R. R.* v. *Powers*, 201 U. S. 245; *Greene* v. *Louisville and Interurban Railroad*, 244 U. S. 499; *Davis* v. *Wallace*, 257 U. S. 478."

We feel that it clearly appears, from the authorities cited in this brief and in appellee's motion to dismiss appeal, there is nothing in the record that could possibly be construed as giving United States Circuit Court of Appeals of the Eighth Circuit any jurisdiction whatsoever, and as there can be but one appeal the appellants' motion to remand this cause to the United States Circuit

Court of Appeals of the Eighth Circuit should be overruled and appellee's motion to dismiss appeal sustained.

Respectfully submitted,

ALBERT S. MARLEY,
Attorney for Appellee, B. Haywood Hagerman.

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OCTOBER TERM, 1923.

McMILLAN CONTRACTING COMPANY, a corporation, and FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, a corporation,

Appellants

v. No. 168

B. HAYWOOD HAGERMAN,

Appellee.

Appellants' Supplemental Brief on Motion to Dismiss.

JUSTIN D. BOWERSOCK,
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Appellants

v. No. 168

B. HAYWOOD HAGERMAN,

Appellee.

Appellants' Supplemental Brief on Motion to Dismiss.

Since the filing of Appellants' brief on the motion to dismiss. there have been certain decisions of this court and of the Circuit Courts of Appeals construing the statute of September 14, 1922, amending the judicial code by adding thereto Section 238a. Appellants respectfully pray leave of the Court to submit this supplemental brief referring to these additional authorities.

In the case of *Pothier* v. *Rodman,* decided by this Court on March 12, 1923, and reported in 43 S. Ct. 374, this court entered an order transferring said case to the Circuit Court of Appeals for the First Circuit, pursuant to the Act of September 14, 1922. The appeal in the case had been taken from the District Court for the District of Rhode Island direct to this Court when it should have gone to the Circuit Court of Appeals for the First Circuit.

The case of *Wagner Electric Mfg. Co.* v. *Lyndon,* decided by this Court on May 21, 1923, and reported in 43 S. Ct. 589, is of particular importance. The Wagner Company brought suit in the United States District Court for the Eastern Division of Missouri against Lyndon and the Sheriff of the City of St. Louis, seeking to enjoin the Sheriff from paying over to Lyndon certain money collected by the Sheriff on a judgment rendered in the State Court against the Wagner Company. The District Court, on the 1st day of August, 1921, dismissed tthe bill on the ground that no Federal question was raised. The Wagner Company appealed to the Circuit Court of Appeals on the 17th day of October, 1921, which Court affirmed the decree of the District Court on July 7, 1922. A petition for rehearing was filed, which was denied by the Circuit Court of Appeals on September 18, 1922. The Wagner Com-

pany then appealed from the decision of the Circuit Court of Appeals to this Court.

This Court decided that an appeal from the decision of the District Court lay only to this Court and not to the Circuit Court of Appeals, and that but for the Act of September 14, 1922, it would be the duty of this Court to reverse the decree of the Circuit Court of Appeals with directions to dismiss the appeal; but this Court retained jurisdiction of the case and decided the same on the merits pursuant to Section 238a. Chief Justice Taft in rendering the opinion of the Court, discussed the effect of the Act as follows:

> "The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed, and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this court, to which it should have been brought by direct appeal from the District Court, under section 238 of the Judicial Code.

The case is here on appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm, which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals, to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us."

This decision seems to put at rest all the objections urged by the Appellees to the application of the Act of September 14, 1922, to the present case.

In the case of *Hoffman* v. *McClelland*, 284 Fed. 837, the Circuit Court of Appeals for the Fifth Circuit transferred to this Court under the Act of September 14, 1922, a case appealed to the Circuit Court of Appeals, of which only this Court had appellate jurisdiction.

In the case of *Bianchi* v. *Morales*, 288 Fed. 194, a similar transfer was made by the Circuit Court of Appeals for the First Circuit.

The Circuit Court of Appeals for the Fifth Circuit applied the Act in a similar manner in the case of *McLean Oil Company* v. *Ashworth Heirs*, 289 Fed. 73.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
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